

a

CHIEN CHUNG MING

v.

KAY HIAN & CO. PTE. & ANOR.

*b*HIGH COURT, SINGAPORE
GOH JOON SENG J
[SUIT NO. 5490 OF 1985]
30 NOVEMBER 1991

CONTRACT: Remisier's agreement - Plaintiff seeks damages in lieu of lost shares - Fraud - Whether agency rule of actual or apparent authority to apply.

c

The first defendant company and the second defendant had a remisier agreement dated 3 May 1983 whereby the second defendant become an agent of the first defendant.

The plaintiff was a client of the second defendant and held a margin account with the first defendant.

d

The plaintiff's claim is for return or alternatively damages for the lost of the 12 lots of shares totaling 90,000 shares certificates that were handed over to the second defendant or the first defendant in the said circumstances set out in the case.

Held:*e*

[1] By Clause 1 of the remisier agreement it was implied there was authority to collect from and deliver to the clients on behalf of the first defendant certificates in respect of shares bought and sold or to be kept as security for any margin account or for registration.

f

[2] The first defendant is liable for the fraud committed by the second defendant. An act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests.

[3] Where a master permitted a servant to represent himself as having authority, and, with knowledge that the servant was doing so, accepted the benefit of what the servant had done then the holding out of himself by the servant as having authority was a holding out for which the master was responsible.

[Judgment against the first defendant. Damages to be assessed.]

*g***Cases referred to:**

Lloyd (Pauper) v Grace, Smith & Co. [1912] AC 716 (**cit**)
Powell v. Wontner & Renwick [1957] (**cit**)

Legislation referred to:

Securities Industry Act [Sing], s. 2

*h***Other sources referred to:**

Solicitor's Journal Vol. 106 at p. 197
Boustead on Agency 15th Edn., at p. 279

For the plaintiff - Anthony Lee

For the 1st defendant - Karan Nair (Antony Lee with her)

i

JUDGMENT

Goh Joon Seng J:

The first defendant is a company incorporated in Singapore and is a stock broker and a 'dealer' under the Securities Industry Act ('the Act') Ch 289 s. 2 of which defines 'dealer' as "a person who carries on a business of dealing in securities as a body corporate ..."

The second defendant was at all material times a remisier and therefore a dealer's representative under the Act, s. 2 of the Act defines a 'dealer's representative' as 'a person by whatever name described, in the direct employment of, or acting for, or by arrangement with, a dealer, who performs for that dealer any of the functions of a dealer (other than work ordinarily performed by accountants, clerks or cashiers) whether his remuneration is by way of salary, wages, commission or otherwise; ...

On 3 May 1983 the second defendant entered into a remisier's agreement with the first defendant. By Clause 1 of the said agreement she agreed and undertook to:

carry on the business of the sale and purchase of stocks, shares or other marketable securities
in the name of the said company subject to the rules and Bye-Laws of the Stock Exchange of Singapore Ltd. ... (Emphasis added)

The second defendant was therefore an agent of the first defendant.

The plaintiff was serviced by the second defendant while she was a remisier with Alfa-Pacific Securities Pte. ('Alfa-Pacific'). He became a client of the first defendant when the second defendant resigned from Alfa-Pacific and became a remisier with the first defendant. Through the recommendation of the second defendant the plaintiff became the holder of an ordinary and a margin account with the first defendant. Under the margin account, the plaintiff were given facilities up to the limit of \$300,000 with a deposit either of cash or shares to the value of thirty percent (30%) of the said limit.

The plaintiff's claims are for the return or alternatively damages for the loss of the certificates for 12 lots of shares totalling 90,000 shares which certificates were handed over to the second defendant or the first defendant in circumstances hereinafter set out.

A(i) 5 x 1000 Highlands and Lowlands Bhd. Shares

These shares had been bought by the plaintiff through Alfa-Pacific whilst the second defendant was with Alfa-Pacific. When the second defendant became a remisier with the first defendant the certificates for these shares were collected by one Chung Boon Hoe (DW1) from Alfa-Pacific on behalf of the plaintiff on the instructions of the second defendant. DW1 was then an administrative officer employed by first defendant. These shares were then lodged with the first defendant as security for plaintiff's margin account on 3 June 1983. DW1 was 'deceived' by the second defendant 'into releasing' the certificates to her on 18 July 1983 purportedly for transmission to the plaintiff. They were subsequently sold under the account of the second defendant and the proceeds paid by the first defendant to the second defendant.

(ii) 5 x 1000 Malayan United Industries Bhd. Shares

These shares had also been bought by the plaintiff through Alfa-Pacific whilst the second defendant was with Alfa-Pacific. They were similarly collected by DW1 from Alfa-Pacific on 3 June 1983. They were then lodged with the first defendant as security for the plaintiff's margin account. DW1 was 'deceived' by the second defendant 'into' releasing' the share

- a* certificates to her on 18 July 1983 purportedly for transmission to the plaintiff. They were subsequently sold on 19 August 1984 under the second defendant's account and the proceeds paid to her by the first defendant.

(iii) *5 x 1000 Selangor Coconuts Bhd. Shares*

- b* These shares were bought by the plaintiff through the first defendant on 2 June 1983 and payment made on 15 June 1983. The certificates were never handed to the plaintiff as the plaintiff had given instructions to the second defendant to have them lodged with the first defendant as security for his margin account. At the request of the second defendant on 2 August 1983 they were withdrawn from the plaintiff's margin account and released to her by the first defendant purportedly for transmission to the plaintiff. They were later relodged by the second defendant with the first defendant under the account of one Ng Yong Choh
- c* who is the second defendant's niece. The shares were then sold under the said Ng Yong Choh's account and the proceeds paid into the said Ng Yong Choh's account with the first defendant to reduce the amount due to the first defendant from the said Ng Yong Choh.

(iv) *10 x 1000 Band Raya Development Bhd. Shares*

- d* The plaintiff bought these shares on 7 June 1983 through the first defendant. The plaintiff paid for the shares on 15 June 1983. They were then lodged with the first defendant as security for the plaintiff's margin account. DW1 was subsequently 'deceived' by the second defendant into 'releasing' the certificates for these shares to her on 5 August 1983. They were then relodged under the margin account of one Francis Wong and sold under his account by the second defendant and the proceeds credited into the account of the said Francis Wong with the first defendant which was then in debit. The said Francis Wong was
- e* another client of first defendant serviced by the second defendant.

(v) *10 x 1000 United Overseas Land Ltd. Shares*

- f* The plaintiff bought through the first defendant 15,000 of these shares. There was a bonus issue of 1 for 5. So the plaintiff had 18,000 shares, 8,000 of which were sold on his instructions leaving 10,000 with the first defendant as security for his margin account. DW1 admitted to releasing the certificates for 5,000 shares held as security to the second defendant on 2 August 1983. These 5,000 shares were relodged with the first defendant by the second defendant under the account of the said Francis Wong on 4 October 1983 and then sold under his account and the proceeds set off against the debit balance due from him to the first defendant. The first defendant is unable to account for the other 5,000 shares. But from the acknowledgment PB6 dated 1 October 1983 first defendant had confirmed that these 15,000
- g* shares amongst others were 'in safe custody' of the first defendant. Therefore the 5,000 shares unaccounted for by the first defendant would also have been lost or released by the first defendant to the second defendant without the knowledge of the plaintiff.

(vi) *5 x 1000 United Overseas Bank Ltd. Shares*

- h* These shares were bought by the plaintiff through the first defendant on 28 July 1983. The plaintiff's wife Oey Bie Lan (PW2) made payment on 12 August 1983 with a cheque postdated to 18 August 1983. The second defendant was instructed to lodge them with the first defendant as security for the plaintiff's margin account. They were later released by the first defendant to the second defendant on 23 December 1983 and were then sold by the second defendant through M/s. E.G. Tan & Co. Pte.

i

(vii) *5 x 1000 P. Pelangi A Shares*

a

These shares were bought by the plaintiff through the first defendant. Payment was made by PW2 on 8 August 1983 at the office of the first defendant and the certificates were handed by PW2 to the second defendant to be lodged with the first defendant as security. But they were subsequently sold by the first defendant under the account of the said Francis Wong and the proceeds set off against the debit balance due from the said Francis Wong to the first defendant.

b

(viii) *5 x 1000 George Kent [Malaysia] Bhd. Shares*

The plaintiff bought these shares through the first defendant on 28 July 1983. PW2 made payment for them at the office of the first defendant on 8 August 1983. She took delivery of the certificates and handed them over to the second defendant to effect the instructions given by the plaintiff to the second defendant to have them lodged with the first defendant as security. These shares were subsequently sold by the first defendant for the account of the said Francis Wong and the proceeds set off by the first defendant against the balance due from him.

c

B. 10 x 1000 Magnum Corporation Bhd. Shares

The plaintiff bought these shares through the first defendant on 19 August 1983. Payment therefor was made by the plaintiff by cheque handed to the second defendant but drawn in favour of the first defendant. The plaintiff gave instructions to the second defendant to have the shares registered in his name. The certificates were collected by the second defendant on behalf of the plaintiff but lodged with the first defendant under the margin account of the said Francis Wong. They were sold on 20 October 1983 and the proceeds credited to the said Francis Wong whose account was then in debit.

d

e

C(i) 20 x 1000 Hwa Hong Manufacturing Co. Ltd. Shares

The plaintiff bought them through the first defendant on 2 August 1984. On 10 August 1984 the second defendant delivered the share certificates to PW2 at PW2's office. The second defendant informed PW2 that she had paid for the shares and requested PW2 to reimburse her. Accordingly PW2 handed her a cheque drawn in favour of the second defendant in exchange for the share certificates. In January 1985 the plaintiff handed these certificates to the second defendant at the first defendant's office with instructions to have them registered in the name of PW2. These instructions were never carried out. The shares were subsequently sold by the first defendant under the account of the second defendant and the proceeds credited to her. At p. 57 of the notes of evidence, DW1's evidence is as follows:

f

Q: What about the 20,000 Hwa Hong shares?

g

A: Plaintiff bought them on 2 August 1984. They were never put into plaintiff's margin account but put in second defendant's account. They were sold under second defendant's account on 18 January 1985, the proceeds used to contra losses of one of her other clients. Second defendant was then winding up her account with first defendant. At that point of time, her wrong doings were already known. We did not check to see if the shares claimed to be hers were in fact hers.

h

(ii) *5 x 1000 Van Der Horst Ltd. Shares*

These shares were bought by the plaintiff through the first defendant on 2 August 1984. The second defendant brought the certificates to PW2's office on 13 August 1984 and requested PW2 for reimbursement as she had paid for the shares on behalf of the plaintiff.

i

- a** PW2 handed to second defendant a cheque drawn in her favour. In January 1985 the plaintiff handed the certificates for these Van Der Horst shares at the office of the first defendant to the second defendant with instructions to have them registered in the name of PW2. This instruction was never carried out but instead the shares were later sold under the account of the second defendant and the proceeds applied by the first defendant to set off balance due to the first defendant from the second defendant. See the evidence of DW1 at p. 57 of the notes of evidence:
- b**

Q: What about the 5,000 Van Der Horst shares?

A: They were bought by plaintiff. These ended up in second defendant's account. See DB30. They were sold on 24 and 28 January 1985. See DB30. Proceeds were held back to set off second defendant's debts due to Kay Hian. We did not check if these shares were in fact her shares.

c

(iii) *5 x 1000 Johan Holdings Bhd. Shares*

- The plaintiff bought these shares through the first defendant on 14 August 1984. On 21 August 1984 the second defendant handed the share certificates to PW2 at PW2's office and requested for reimbursement as the second defendant had made payment to the first defendant on behalf of the plaintiff. PW2 handed to the second defendant a cheque for RM8,547.72 in reimbursement. In January 1985 these share certificates were handed over by the plaintiff at the office of the first defendant to the second defendant together with the certificates of the Hwa Hong and Van Der Horst shares with instructions to register same in the name of PW2. This instruction was never effected. But these shares were sold on 18 January 1985 under the account of and the proceeds credited to the said Ng Yong Choh but the cheque for the proceeds was collected by the second defendant.
- d**
- e**

All the transactions enumerated above were handled by the second defendant as a remisier in the service of the first defendant.

- By Clause 1 of the remisier's agreement the second defendant was expressly authorised to 'carry on the business of the sale and purchase of stocks, shares and other marketable securities in the name of the first defendant. Implied in this must be the authority to collect from and deliver to the client on behalf of the first defendant certificates in respect of shares bought or sold or to be kept as security for any margin account or for registration.
- f**

Alternatively if the collection of these share certificates from and on behalf of the plaintiff was not, in the circumstances pertaining to their conversion, within the implied authority of the second defendant it was persistently held out to be so by the first defendant. See the evidence of DW1. At pp. 36-37 of the notes of evidence:

g

Q: Do you agree that the remisier is authorised to trade in the name of first defendants?

A: Yes, I agree.

Q: Was the second defendant authorised to do anything else for the company in dealing with the clients on behalf of Kay Hian?

h

A: Taking delivery of shares from the client on behalf of Kay Hian for completing the sale. The remisier also takes delivery of the scrips from the company to send them over to the client in the event of a purchase by the client. This practice is done all the time and first defendants are aware of it. This is a common practice.

Q: Is second defendant authorised to accept lodgement of scrips of collaterals from the client on behalf of first defendants?

i

A: I don't think so because she is not authorised to issue receipts for the scrips. But of course she could take delivery of the scrips from the clients and hand them over to my department and my department will issue the receipts. First defendants are aware of this practice. **a**

Q: As far as the clients are concerned, they can lodge their collaterals with the second defendant?

A: Yes. **b**

Q: Remisiers like second defendant are also authorised to collect money on behalf of first defendants?

A: Yes.

At p. 52 of the notes of evidence: **c**

Q: Was it common for remisiers like second defendant to accept share scrips for registration, margin and safe keeping from the clients?

A: It is common. The company is aware of the practice.

Q: Was plaintiff informed by anyone in the margin department that only certain staff could sign this type of receipt (for shares) for Kay Hian? **d**

A: No.

By Court:

A: The company is aware of the practice of remisiers collecting from and handing over the scrips to the client. This is a service to the client and the company should be happy with remisier rendering such service. **e**

At p. 57 of the notes of evidence:

Q: See AB44 - the collection records. Please confirm if the remisiers are authorised to collect the scrips before payment is made by the client?

A: Correct. The client will have to pay the next day.

Q: Under this arrangement the remisier collects the scrips, takes them to client, hands over the scrips and collects payment? **f**

A: Correct.

The first defendant was also aware that the second defendant had been issuing receipts to clients for share certificates handed over by the clients. See the evidence of DW1.

At p. 58 of the notes of evidence: **g**

Q: Do you know whether any remisier was issuing receipts?

A: Only second defendant.

The first defendant is therefore liable for the fraud committed by the second defendant. 'An act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interest.' *Boustead on Agency* 15th Edn., at p. 279. It is to be noted that even after the first defendant became aware of the second defendant's wrong doings the first defendant chose not to enquire into the ownership of the shares sold on the instructions of the second defendant. The first defendant then set off the sale proceeds against the debts due from the second defendant or her other clients thereby furthering their own interest. **h**

i

- a** In *Lloyd (Pauper) v Grace, Smith & Co.* [1912] AC 716, a widow who owned two cottages and a sum of money secured on a mortgage, being dissatisfied with the income derived therefrom, consulted a firm of solicitors and saw their managing clerk who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm he induced her to give him instructions to sell the cottages and call in the mortgage money, and for that purpose to give him her title deeds for which he gave a receipt in the name of the firm and also to sign two documents, which were neither read nor explained to her and which she believed she had to sign in order to effect the sale of the cottages. These documents were in fact a conveyance to him of the cottages and a transfer to him of the mortgage. He then dishonestly disposed of the property for his own benefit. It was held that the firm was responsible for the fraud committed by their managing clerk in the course of his employment. Lord Loreburn in his judgment said at p. 724:
- b**
- c** ... The managing clerk was authorised to receive deeds and carry through sales and conveyances, and to give notices on the defendant's behalf. He was instructed by the plaintiff, as the representative of the defendant's firm, - and she so treated him throughout - to realise her property. He took advantage of the opportunity so afforded him as the defendant's representative to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion there is an end of the case. It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal.
- d**
- If the agent commits the fraud purporting to act in the course of business such as he was authorised, or held out as authorised, to transact on account of his principal, then the latter may be held liable for it.
- e**
- In *Powell v. Wontner & Renwick* (a firm) reported in the *Solicitor's Journal* Vol. 106 p. 197, in late 1957 the defendants, a firm of stock brokers employed F as a jobber's ledger clerk, it being agreed that while in their employment F might continue to deal with his own following of customers who transacted Stock Exchange business through him, on terms that such transactions should be conducted through their firm, which would earn its commission thereon, one-third of which would be payable to F. The plaintiff, the majority share holder of a private company, who had previously transacted Stock Exchange business through F, had an account opened in his name with the stockbrokers after F joined their firm. The only communications that passed directly between the plaintiff and the stockbrokers were statements of his account, contract notes and an occasional letter written on their printed writing-paper but signed by F. On 8 May 1959 the stock brokers terminated F's employment but until the end of that month he remained nominally in their service to clear up the affairs of his own customers. About the middle of May, on F's suggestion and advice, the plaintiff instructed F to buy certain shares through a nominee company of F's bank and paid F some £2,700 for them. Subsequently, the plaintiff received a copy of a bought note for the shares dated 19 May, together with one of the defendants' compliments slips. By the end of May, F had caused the nominees to sell a parcel, and by the end of 1959 the remainder of the shares, and the bank to credit the proceeds to his private account. It was later ascertained from the bank that the shares had been bought on F's orders and on his account and held by nominees for him. The plaintiff sued the stockbrokers for, *inter alia*, damages for breach of contract, and contended that F, in receiving his orders and in purporting to carry them out but in fact failing to do so, was acting within the scope of his actual or ostensible authority as their servant so that they were bound by the contract made and broken by F.
- f**
- g**
- h**
- i**

Justice Glyn-Jones in giving judgment for the plaintiff said that it would be unjust if the stock brokers were to retain the benefit of F's acting as a stockbroker towards his own following and at the same time divest themselves of all responsibility for his conduct while so acting. It was part of a stockbroker's business to advise customers to carry out a transaction in the name of nominees and to advise how to conduct the transaction and, if necessary, carry it out for them, and he found that the stockbrokers authorised F so to advise customers and so to act on their behalf. The transaction F engaged in was within the scope of his employment and the contract he made was binding on his employers. The effect of the contract was that the stockbrokers, by F, undertook that F should retain control of the shares for the plaintiff's benefit, and they were liable for breach of that undertaking notwithstanding that F caused the shares to be sold after leaving their service. It was plain that where a master permitted a servant to represent himself as having authority, and, with knowledge that the servant was doing so, accepted the benefit of what the servant had done, then the holding out of himself by the servant as having authority was a holding out for which the master was responsible. There need be no direct representations made by the master before holding out might take place. Accordingly I enter judgment for the plaintiff against the first defendant for damages to be assessed with costs reserved.

Also found at [1992] 1 CLJ 725

a

b

c

d

e

f

g

h

i